Filed 12/12/08 Ins. Co. of the State of Pennsylvania v. Nat. Fire Ins. Co. of Hartford CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Plaintiff and Appellant,

v.

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD,

Defendant and Respondent.

G039491

(Super. Ct. No. 06CC06318)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, David C. Velasquez, Judge. Request for judicial notice. Order reversed. Request for judicial notice denied.

McCurdy & Fuller, Mary McCurdy; Hayes Davis Bonino Ellingson McLay & Scott, Mark G. Bonino and Miya R. Peard for Plaintiff and Appellant.

Colliau, Elenius, Carluccio Keener & Morrow and Robert C. Christensen for Defendant and Respondent.

The trial court granted the motion of defendant National Fire Insurance Company of Hartford as Successor by Merger to Transcontinental Insurance Company (Transcontinental) to disqualify counsel for plaintiff Insurance Company of the State of Pennsylvania in an insurance coverage dispute arising from a construction defect action. Plaintiff contends this was error because, among other things, there was no substantial relationship between this action and counsel's representation of Transcontinental's corporate affiliate in a prior action. We agree and reverse the order.

FACTS AND PROCEDURAL BACKGROUND

In 2000, Palumbo Bergstrom, LLP (Palumbo) represented Continental Insurance Company (Continental) in multiple lawsuits, collectively identified as the *Lusk* actions. In those matters, Continental sought to recover contribution from the carriers of additional insureds regarding an underlying construction defect case.

The present lawsuit, filed by Palumbo on plaintiff's behalf on May 19, 2006, also arises out of a construction defect action (*Laguna Niguel/Copley v. Niguel Summit II*, Super. Ct. Orange County, 1999, No. 813214). Plaintiff seeks declaratory relief, indemnity, and contribution from Transcontinental, among others, for fees and costs it incurred in defending the developer of an apartment complex in that action.

Beginning three months after the current lawsuit was filed, Transcontinental requested in writing several times that Palumbo withdraw as counsel for plaintiff. When Palumbo did not withdraw by the following July, Transcontinental filed a motion to disqualify it on the ground Continental and Transcontinental are corporate affiliates that share a unity of interest.

In support, Transcontinental attached a declaration from Trevor Claybough, the claims director at the Brea, California office for Transcontinental and Continental, which are "both members of the CNA group of companies." Claybough attested that,

currently and at all relevant times, construction defect claims and the insurance coverage issues under policies issued by Transcontinental and Continental are handled by the same claims department and personnel using the same claims guidelines and procedures. The court sustained plaintiff's objections to Claybough's assertion that because Transcontinental and Continental "share the same claims department, claims personnel, claims guidelines, and claims procedures, Palumbo was able to obtain confidential information regarding both [companies] during the course of the representation of Continental" in the *Lusk* actions.

The trial court granted Transcontinental's motion, finding "the legal or factual issues in the present case against Transcontinental are substantially related to those issues in the prior case where counsel appeared on behalf of Continental. The . . . prior [*Lusk* actions] involved legal and factual issues similar to the issues in the present litigation concerning additional insurance coverage in a construction defect claim. The Palumbo firm was substantially involved in the earlier actions because it was the primary, if not sole, attorney for Continental in those cases. The information acquired by the Palumbo firm through privileged communications with its client in the prior actions could be material to the evaluation of the issues in the present case against Transcontinental. Therefore, there is a substantial relationship between the legal issues in the instant action and the . . . prior [*Lusk* actions] cases involving Continental."

DISCUSSION

1. Standard of Review

The parties disagree on the appropriate standard of review. Transcontinental argues it is abuse of discretion. Plaintiff asserts a de novo standard applies because the trial court used the wrong legal principles and the basic facts are undisputed. Both parties are partially correct.

"Generally, a trial court's decision on a disqualification motion is reviewed for abuse of discretion. [Citations.] If the trial court resolved factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence. [Citations.] When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion. [Citation.] However, the trial court's discretion is limited by applicable legal principles. [Citation.] Thus, where there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law. [Citation.] In any event, a disqualification motion involves concerns that justify careful review of the trial court's exercise of discretion." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc*. (1999) 20 Cal.4th 1135, 1143-1144.)

"When the declarations submitted in connection with the motion to disqualify do not contain conflicting descriptions of the facts, an appellate court need not defer to the inferences drawn by the trial court in resolving factual disputes for which the parties did not submit direct evidence. [Citations.] In such a situation, the appellate court is concerned with the legal significance of the undisputed facts in the record and reviews the trial court's decision as a question of law. [Citation.]" (*Faughn v. Perez* (2006) 145 Cal.App.4th 592, 601.)

2. Standard for Disqualification

"'Ultimately, disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility.' [Citation.] . . . [H]owever, '[t]he paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar.' [Citation.] [¶] When disqualification is sought because of an attorney's successive representation of clients with adverse interests, the trial court must balance the

current client's right to the counsel of its choosing against the former client's right to ensure that its confidential information will not be divulged or used by its former counsel." (*City and County of San Francisco v. Cobra Solutions* (2006) 38 Cal.4th 839, 846 (*Cobra Solutions*).)

The "enduring duty to preserve client confidences precludes an attorney from later agreeing to represent an adversary of the attorney's former client unless the former client provides an 'informed written consent' waiving the conflict. (Rules Prof. Conduct, rule 3-310(E).) If the attorney fails to obtain such consent and undertakes to represent the adversary, the former client may disqualify the attorney by showing a '"'substantial relationship'"' between the subjects of the prior and the current representations." (*Cobra Solutions, supra*, 38 Cal.4th at p. 847.) Palumbo does not claim it obtained such consent in this action, nor is there any evidence that it did.

"'Whether or not disqualification is required in successive representation cases depends upon two variables: "(1) the relationship between the legal problem involved in the former representation and the legal problem involved in the current representation, and (2) the relationship between the attorney and the former client with respect to the legal problem involved in the former representation." [Citation.]' [Citation.] This rule is based upon the potential violation of the lawyer's duty of confidentiality. [Citation.] 'If a substantial relationship exists, courts will presume that confidences were disclosed during the former representation which may have value in the current relationship. Thus, actual possession of confidential information need not be proven. . . .' [Citation.]" (*Cal West Nurseries, Inc. v. Superior Court* (2005) 129 Cal.App.4th 1170, 1174-1175.)

3. Substantial Relationship Between Legal Issues

The first question is whether the subject of the present litigation and the matter on which Palumbo worked as the attorneys for Continental are substantially related. Plaintiff contends the answer is no. We agree.

"To determine whether there is a substantial relationship between successive representations, a court must first determine whether the attorney had a direct professional relationship with the former client in which the attorney personally provided legal advice and services on a legal issue that is closely related to the legal issue in the present representation. [Citation.] If the former representation involved such a direct relationship with the client, the former client need not prove that the attorney possesses actual confidential information. [Citation.] Instead, the attorney is presumed to possess confidential information if the subject of the prior representation put the attorney in a position in which confidences material to the current representation would normally have been imparted to counsel. [Citations.] When the attorney's contact with the prior client was not direct, then the court examines both the attorney's relationship to the prior client and the relationship between the prior and the present representation. If the subjects of the prior representation are such as to 'make it likely the attorney acquired confidential information' that is relevant and material to the present representation, then the two representations are substantially related. [Citations.] When a substantial relationship between the two representations is established, the attorney is automatically disqualified from representing the second client. [Citations.]" (*Cobra Solutions, supra*, 38 Cal.4th at p. 847.)

It is undisputed Palumbo directly represented Continental in the *Lusk* actions. The only remaining issue, therefore, is whether there was a substantial relationship between what Palumbo did for Continental during the *Lusk* actions and what it seeks to do for plaintiff in this case.

The determination of whether the current and prior representations are substantially related is not limited to the "precise legal and factual issues" involved in the various cases. (*Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 712.) In the prior representation, the attorney may have obtained confidential information about the former client or its affairs that might determine the former client's course of action in the current representation, such as information about "unrelated adverse ramifications" to the former client were the case to go to trial, the former client's internal operations or policies affecting litigation strategy, the identity of the key decision makers, and the financial impact of pending claims against the client. (*Id*. at pp. 712-713.) "Thus, successive representations will be 'substantially related' when the evidence before the trial court supports a rational conclusion that information material to the evaluation, prosecution, settlement or accomplishment of the former representation given its factual and legal issues is also material to the evaluation, prosecution, settlement or accomplishment of the current representation given its factual and legal issues." (*Id*. at p. 713.)

On the other hand, exposure to "general 'playbook' information" such as a former client's general litigation or settlement strategy is not sufficient to disqualify an attorney from an adverse successive representation. (*Farris v. Fireman's Fund Ins. Co*. (2004) 119 Cal.App.4th 671, 688.) "[O]nly 'when such information will be directly in issue or of unusual value in the subsequent matter will it be independently relevant in assessing a substantial relationship[.]' . . . Thus, for example, the attorney's acquisition during the first representation of general information about the first client's 'overall structure and practices' would not of itself require disqualification unless it were found to be 'material'—i.e., directly in issue or of critical importance—in the second representation. [Citation.] The same is true about information such as the first client's 'litigation philosophy' or 'key decision makers.'" (*Id*. at p. 680.)

Here, the record fails to show the prior and current litigations were substantially related. Transcontinental argues that, "Like the Lusk actions, this action involves construction defect coverage issues and additional insured endorsements, as well as the recovery of money based on Transcontinental's policies, and entails an examination of the same type of legal issues and construction defect coverage law pursuant to Transcontinental's custom and practice. The same evaluation, prosecution, settlement or accomplishment of additional insured coverage litigation is present in both the Lusk actions and this action." These basic facts are undisputed. What is disputed is the legal significance of these facts, an issue we review as a question of law. (*Faughn v. Perez, supra,* 145 Cal.App.4th at p. 601.)

As plaintiff notes, Palumbo represented Continental as a plaintiff, not a defendant, in the *Lusk* actions to recover the money Continental had already paid. In the course of representing Continental, Palumbo was provided with the additional insureds' policies or endorsements, not Continental's. The record contains no evidence Palumbo participated in Continental's defense or in any underlying insurance coverage dispute between Continental and its insured. There is also no evidence Palumbo would have "had access to any claims handling information or policies regarding such claims."

Even if Palumbo, while representing Continental in the *Lusk* actions, might have gained insight into Continental's interpretation of its policy language and claims handling and litigation strategies, this is general playbook information that is insufficient to disqualify Palumbo. Transcontinental has not produced evidence supporting an inference that Palumbo was in a position to obtain unusual or uniquely relevant information about the client's claims or litigation strategy that would give it a significant practical advantage in the current litigation.

By way of comparison, in *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft* (1999) 69 Cal.App.4th 223, which applied a successive representation standard, the attorney was disqualified because he had obtained confidential information that was

material to the current representation. (*Id*. at pp. 234-235.) In *Farris*, the attorney was disqualified because of his "pervasive participation, and indeed his personal role in shaping, [the insurer's] practices and procedures in handling California coverage claims, practices and procedures that . . . were likely to . . . [be] directly in issue in this case." (*Farris v. Fireman's Fund Ins. Co*., *supra,* 119 Cal.App.4th at p. 688.)

Transcontinental failed to establish that Palumbo obtained confidential information material to the current representation or that the nature of Palumbo's relationship to Continental was comparable to the close and personal relationship between the *Farris* attorney and his former client. Nor can we, on the record provided by Transcontinental, infer Palumbo obtained confidential information during the *Lusk* actions that is material to the current matter. Under the applicable legal standards and the undisputed facts, the trial court abused its discretion in granting the motion to disqualify Palumbo because the substantial relationship test was not met. (*Cobra Solutions, supra*, 38 Cal.4th at pp. 847-848.)

Because we have concluded that Transcontinental as the moving party did not present sufficient evidence to establish the substantial relationship test in this case of successive representations, we do not reach the issue of whether Transcontinental, a corporate affiliate of Continental, should be treated as a former client of Palumbo or the remaining issues raised by plaintiff on appeal. Plaintiff's request for judicial notice is denied as the materials in question are unnecessary to our resolution of the appeal.

DISPOSITION

The order disqualifying counsel is reversed. The trial court on remand shall issue a new order denying Transcontinental's motion. Appellant shall recover its costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.